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No. 88-758

In The

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE McDOWELL

Petitioner,

v.

DYNAMICS CORPORATION OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Dynamics Corporation of America, respectfully prays that a writ of certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on June 29, 1988.

PERTINENT FEDERAL RULE

Federal Rule of Civil Procedure 56(c) and (e) provide in pertinent part:

> (c) The motion [for summary judgment] shall be served at least ten days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> (e) [W]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate shall be entered against the adverse party.

STATEMENT OF THE CASE

On October 20, 1988, the petitioner, Eugene McDowell, filed a complaint in the United States District Court for the Eastern District of Kentucky, Lexington Division, alleging that he sustained severe and permanent bodily injuries on or about October 22, 1982 when using a portable elevator conveyor known as a "Little Giant" which was manufactured and designed by the

respondent, Dynamics Corporation of America and/or its said predecessor, Portable Elevator Manufacturing Company.[1] The complaint alleged defective design, failure to warn and breach of implied warranty. In its Answer, respondent denied the allegations set out in the complaint and also affirmatively pleaded the defenses of contributory negligence, the statutory presumption that the product was not defective and the statutory defense of alteration of the product.

Discovery was taken by both petitioner and respondent and on September 4, 1986, the District Court entered an order that discovery was to be completed 60 days from September 4, 1986 and that motions for summary judgment could not be filed later than 90 days after September 4, 1986.

On December 3, 1986, the respondent, Dynamics Corporation, filed a motion for summary judgment as well as a memorandum of law in support of the motion for summary judgment. In the memorandum, the respondent argued that the petitioner was contributorily negligent in causing the accident which resulted in injury to him and therefore, under the Kentucky Products Liability Statute, Ky. Rev. Stat. 411.320(3) (1978), he was barred from recovery. App. 1. Additionally, respondent argued that the product at issue was not used by the petitioner in its original unaltered and unmodified condition and therefore, under Ky. Rev. Stat. 411.320(1) (1978), he was barred

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[1] In compliance with 28.1 of the Rules of the Supreme Court Dynamics Corporation of America states it has no parent, subsidiary or affiliates.

from recovery. In support of its argument that the petitioner was barred from recovery because the product was not used in an unaltered state, respondent attached the affidavit of Robert Thayre who is the National Service Manager for the Portable Elevator Division of Dynamics Corporation of America. In that affidavit, Mr. Thayre stated that the elevator which was in question was heavily modified and that the alteration caused the petitioner's injury.

Petitioner filed a memorandum in opposition to the motion for summary judgment and in response to the argument that the product had been altered and that the alteration caused his injury, petitioner responded that he had an outstanding request for production of documents and that because the respondent had failed to respond to this request, summary judgment should not be granted. The petitioner also filed a motion to compel the respondent to produce the information which was the subject of the request for production of documents.

On February 18, 1987, the Court conducted a hearing in which the motion for a summary judgment was taken under advisement as was the motion to compel production of documents. Additionally, the Court set a jury trial for May 26, 1987. On February 25, 1987, the District Court entered a memorandum opinion and order denying the respondent's motion for summary judgment at that point in time stating that discovery should be completed before any motion for summary judgment would be appropriate. Additionally, the Court indicated that the respondent had, in fact, provided the documents which were requested and which were subject to the Motion to Compel Discovery.

On April 24, 1987, the District Court held another pre-trial conference. At that time, Dynamics Corporation, orally renewed its motion for summary judgment and asked the Court to reconsider it since the case was set for trial in May of 1987 and the outstanding motion for summary judgment needed to be ruled upon. Petition for Cert., App. 27a. At that time, counsel for petitioner indicated to the Court that it was important to allow the deposition of his expert to be taken before the motion for summary judgment was considered and the court indicated that maybe that was true. Petition for Cert., App. 28a. On April 22, 1987, respondent noticed the discovery deposition of petitioner's expert, Dr. John Sevart for May 15, 1987. On April 24, 1987, the petitioner filed a witness and exhibit list naming Dr. Sevart as well as H. Bradley Hammon as expert witnesses who would testify on beh. 'f of the petitioner at the trial. On May 15th, the deposition of Dr. John Sevart was taken for discovery by respondent.

After the discovery deposition of Dr. John Sevart, petitioner filed no additional pleadings in the District Court responding to the renewed motion for summary judgment. On June 30, 1987, the District Court issued an order sustaining the motion for summary judgment and stating, "there is unrefuted evidence of record that the product in question has been substantially modified and altered." Petition for Certiorari App. 15a. The Court thereafter set out the findings of Mr. Thayer as described in his affidavit and then concluded:

> [I]t is clear that the defendant Dynamics Corporation of America is entitled to the presumption afforded it by KRS 411.310(1) and (2). Plaintiff has not come forward with any evidence to rebut this presumption.

> Furthermore, it is equally clear that under KRS 411.320(1), Dynamics Corporation of America would only be liable for plaintiff's injury 'if the product had been used in its original, unaltered and unmodified condition.'
>
> There is no doubt that this product has been substantially modified and altered by one or more individual consumers subsequent to its date of manufacture in the late 1960's. Inasmuch as there is no way to determine what injury, if any, plaintiff would have received if the 'little giant' had been used in its original, unaltered and unmodified condition, the question of liability is purely academic. The defendant, Dynamics Corporation of America, cannot be liable to plaintiff under these circumstances.

Petition for Cert., App. 16a and 17a.

No petition for reconsideration was ever filed by petitioner with the District Court. Instead, on July 13, 1987, petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit from the judgment entered in the action on June 30, 1987.

After the District Court had granted the motion for summary judgment, counsel for respondent received a letter from Don K. Smith and Associates, the court reporter who had taken and transcribed the deposition of Dr. John Sevart. The court reporter indicated that as of July 6, 1987, the deposition of Dr. Sevart had been returned to the office with the corrections made by Dr. Sevart and that the deposition was then placed in a court envelope and forwarded to respondent's counsel for safekeeping until the time of trial. App. 10.

On appeal petitioner argued that the testimony of Dr. Sevart which was taken at the discovery deposition established an issue of fact regarding the alteration of the

product in question and therefore, summary judgment was inappropriate. In response, respondent pointed out to the Court that the testimony of Dr. Sevart was not before the District Court at the time that it ruled on the motion for summary judgment and therefore, the appellate court could not consider the testimony of Dr. Sevart in reviewing the District Court's order granting summary judgment. In his reply brief, the petitioner argued that he should not be penalized for the court reporter's failure to file the deposition of Dr. Sevart with the Court and furthermore, requested the Court of Appeals once again to consider the deposition of Dr. Sevart which had been included in the record after the notice of appeal had been filed by petitioner.

In response to the petitioner's argument that the court reporter and counsel for respondent had failed to file the deposition of Dr. Sevart, respondent filed a motion to supplement the record with the letter from the court reporter indicating that, in fact, the transcript of the deposition of Dr. Sevart was not completed by the court reporter nor even sent to respondent's counsel until July 6, 1987, after the court had already sustained the motion for summary judgment. Furthermore, counsel for respondent filed an affidavit stating that the transcribed deposition of Dr. Sevart was not sent to him until July 6, 1987. App. 11. The District Court supplemented the record on appeal with the deposition of Dr. Sevart, the letter from the court reporter who took and transcribed Dr. Sevart's deposition and the affidavit from respondent's counsel. Petitioner also asked the United States Court of Appeals for the Sixth Circuit to supplement the record on appeal

with a transcript of the hearing which was conducted in the District Court on April 24, 1987 wherein the respondent, Dynamics Corporation, renewed the motion for summary judgment.

After briefs were filed with the Court of Appeals, oral argument was conducted. On June 29, 1988, the Court issued an opinion affirming the District Court's order granting summary judgment. In the opinion, the Court stated there is precedent to consider depositions despite their late filing under Fed. R. App. P. 10(e). However, the Court found that the petitioner could not rely on Rule 10(e) because the District Court never in any fashion considered the evidence in the depositions because the evidence was never brought to its attention. The Court stated:

> [I]t is for the party opposing such a motion to bring to the attention of the District Court those relevant materials upon which he seeks to rely. Neither by motion nor by a petition for reconsideration did plaintiff's counsel advise the District Court of the contents of the late filed affidavits and seek reconsideration. Regardless of whether or not the parties had knowledge of the contents of the depositions in dispute and their alleged evidentiary value, the judge must be advised or informed when a summary judgment motion is outstanding as to responsive materials relied upon.

Petition for Cert., App. 7a, 8a and 9a.

The petitioner filed a petition for rehearing en banc and the Court of Appeals denied the petition on the basis that the issues raised in the petition were fully considered upon the original submission and decision of the case.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Court below was correct in affirming the judgment of the District Court granting the respondent, Dynamics Corporation of America, summary judgment. This is a case in which the petitioner failed to take any affirmative action in order to counter the motion and memorandum of law in support of the motion for summary judgment. As a result of the petitioner's failure to take any affirmative action whatsoever, the motion for summary judgment was granted.

Petitioner seeks to place blame on the court reporter. The court reporter had not even completed the deposition of Dr. John Sevart until after the Court granted the summary judgment motion. Therefore, any omission on the part of the court reporter is immaterial and irrelevant to the appropriateness of the District Court's order.

Fed. R. Civ. P. 56(c) sets out specific duties on the part of the non-movant party on a motion for summary judgment. Petitioner failed to follow the directives of the rule and this failure resulted in the District Court's deciding the motion for summary judgment on an incomplete record. The petition for writ of certiorari to this Court is one last effort on the part of the petitioner to rectify the error he made in the lower courts.

The petitioner argues there is a conflict within the circuits on the inherent power of courts of appeal to consider evidence not presented to trial courts. This alleged conflict does not exist. Fed. R. App. P. 10(e) is a uniform rule which guides all appellate courts on when they can enlarge a record on appeal to consider matters not previously submitted to the lower courts. The Rule

allows the appellate court, in some circumstances, to enlarge the record on appeal to consider matters which are not in the record but were, in fact, relied upon by the lower courts. The cases cited by the petitioner to support his allegation that there is, in fact, a conflict in the circuits are cases in which the court ruled that it was inappropriate to exercise the authority granted by Fed. R. App. P. 10(e). There are cases from these same circuits ruling that new evidence and issues cannot be reviewed on appeal when they were not brought first to the lower court's attention.

Finally, petitioner alleges in his statement for reasons to grant certiorari that Dynamics does not dispute that summary judgment could not have been granted in the face of the Sevart deposition. The respondent, Dynamics, vehemently disagrees with this statement and submits that regardless of what evidence petitioner submitted on his behalf by any expert witnesses, the Kentucky Products Liability Statute, Ky. Rev. Stat. 411.320 (1978) is so broad as to establish a complete defense to the manufacturer in cases such as this one. The product was altered and this alteration was a substantial cause in the occurrence that caused the injury or damage to the petitioner and therefore, the summary judgment was appropriate.

I. THE DECISION BELOW DID NOT PENALIZE THE PETITIONER FOR A REPORTER'S FAILURE TO FOLLOW RULE 30(f)(1).

Petitioner argues that the Court below penalized him for the court reporter's failure to file the transcript of the deposition of Dr. John Sevart with the District Court Clerk. This argument misinterprets the Appellate Court's opinion.

The respondent agrees that the court reporter who took and transcribed the deposition of the petitioner's expert, Dr. John Sevart failed to file a copy of the transcript, upon completion, with the District Court Clerk. However, this omission occurred after the District Court Judge had already entered an order granting the motion for summary judgment filed by the respondent.

The respondent renewed its motion for summary judgment at a hearing which was conducted in the District Court on April 24, 1987. On May 15, 1987, the discovery deposition of Dr. John Sevart was taken by the respondent. Thereafter, the deposition was not even completed to be filed until July 6, 1987. After the deposition of Dr. John Sevart was taken, the petitioner failed to file any pleading in the District Court alerting the Court to the fact that the deposition was taken and that review of the motion for summary judgment motion should be postponed until after the deposition was filed with the Court. Additionally, petitioner failed to file any pleading setting forth statements made by Dr. Sevart at his deposition which would rebut the evidence presented by the respondents in the motion for summary judgment. Although at the hearing the Court agreed with the petitioner that perhaps the deposition needed to be taken before the summary judgment motion should be considered; after the deposition was taken, the Court was never advised by petitioner that there was any specific evidence developed in this deposition which raised an issue of fact. The court reporter's omission in failing to file the copy of the transcript of Dr. Sevart according to Fed. R. Civ. P. 30(f)(1) was an omission after the fact and therefore, the District Court's failure to review the deposition

was not a result of the omission on the part of the court reporter.

The rule regarding summary judgment specifically sets out duties on the part of the non-movant party when a motion for summary judgment is pending before a Court. Fed. R. Civ. P. 56(c) provides in part that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) further provides that when a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. In this situation, it was encumbent upon the petitioner's attorney to file some response once the summary judgment motion was renewed at the April 24, 1987 hearing. His failure to file any response setting out specific facts showing that there was a genuine issue for trial was fatal to his claim.

It should be pointed out to the court that, in fact, the record on appeal included the deposition of Dr. Sevart. The Court of Appeals did not rule that the deposition of Dr. Sevart could not be included in the record; rather, it ruled that the appellate court could not review the deposition in light of the fact that the evidence contained in that deposition was not brought to the lower court's

attention at the time that a consideration of the motion for summary judgment was had. The Court of Appeals did not penalize the petitioner for the reporter's failure; it penalized the petitioner for his own failure to bring to the District Court's attention the evidence contained within the deposition of Dr. Sevart.

The petitioner argues that the Court of Appeals' decision not to review the deposition of Dr. Sevart is in conflict with other circuits. Specifically, the petitioner cites *Ross v. Kemp*, 785 F.2d 1467 (11th Cir. 1986). *Ross* involved a federal habeas corpus petition by a petitioner who had been convicted of murder and other crimes. The petitioner claimed that there was systematic discrimination in the formulation of the jury which convicted him. During the habeas proceeding at the district court level, the petitioner's attorney had, in fact, taken depositions which were never included into the record. In ruling that the record could be supplemented with one of the depositions, the Court of Appeals stated "[B]oth the appellant and appellees relied on the Murphy deposition in their pleadings. According to circuit precedent, it is appropriate to supplement the record with a deposition and upon which parties relied even though for some unexplained reason it was not filed below." *Id.* at 1472. The petitioner in *Ross* also had requested the Court's permission to supplement the record on appeal with affidavits. The Court stated, "Because the information of the affidavits was not before the District Court in any form, and because neither of the parties relied on the evidence at an earlier point in the proceedings, Fed. R. App. P. 10(e) is inapplicable to this portion of the motion to supplement." *Id.* at 1474. The Court went on to discuss three separate

factors which courts should address in deciding whether to exercise discretionary authority to permit supplementation of the record on appeal. One of the factors which is critical to this case is whether the petitioner's failure to present the proffered material at the lower court was a result of inexcusable neglect. *Id.* at 1476. In this case, there is no question but that the evidence contained in the deposition of Dr. Sevart was not before the District Court because of inexcusable neglect on the part of the petitioner. Far from establishing a conflict with the Sixth Circuit, the Eleventh Circuit in *Ross* articulated a rule under which the petitioner's claim that the lower Court was erroneous in failing to consider the deposition must fail.

The petition also cites *McDaniel v. Travelers Insurance Co.*, 494 F.2d 1189 (5th Cir. 1974) for his proposition that the Court of Appeals erred in not considering the deposition of Dr. Sevart in reviewing the lower Court's order granting summary judgment. In *McDaniel*, the appellant cited to an omitted deposition in a brief and because of this documented reliance, the Court supplemented the record on appeal. *Id.* at 1190. *McDaniel* is factually distinguishable from the facts in this case as here, petitioner did not indicate to the Court that he was relying on specific testimony in the deposition of Dr. Sevart.

Petitioner argues that he did demonstrate to the District Court that he was relying on the deposition of Dr. Sevart by telling the Court at the hearing that the Court should await ruling on the motion for summary judgment until after the deposition of Sevart had been taken and by filing a witness list in which Dr. Sevart's name and the proposed substance of his testimony was included. The

fact remains that the petitioner failed to file any response whatsoever to the renewed motion for summary judgment. Even after the deposition of Dr. Sevart had been taken, the petitioner failed to bring to the Court's attention any evidence which was developed in that deposition which would counter the evidence submitted in support of the motion for summary judgment.

In both *Ross* and *McDaniel*, the petitioner's reliance on the omitted evidence was demonstrated by citation to the evidence in briefs and pleadings before the Court. No such reliance was demonstrated by the petitioner in this case. The petitioner didn't even schedule the deposition of Dr. Sevart; the deposition was scheduled for discovery purposes by respondent. The petitioner failed to develop any proof whatsoever to counter the motion for summary judgment and this failure resulted in a dismissal of his claim.

The petitioner argues that the entry of summary judgment against him was fundamentally unfair and cites a concurring opinion by Justice White in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The petitioner argues that the concurring opinion of Justice White is controlling. However, a review of the Court's opinion will demonstrate that the majority opinion was written by Justice Rehnquist and Justice White concurred in the Court's opinion and judgment. Therefore, Justice White's opinion is not the controlling opinion of the Court.

In *Celotex*, the Court addressed the issue of the moving party's burden in a motion for summary judgment under the Fed. R. Civ. P. 56. The majority stated, "Rule 56(e) therefore requires a non-moving party to go beyond

the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324. This Court recognized that a non-moving party must do more than merely rest on his pleadings in order to counter a motion for summary judgment and the Rules require him to affirmatively designate specific facts which show a genuine issue for trial. Petitioner argues that the lower Court knew that he was relying on the deposition of Dr. Sevart. The petitioner did not fully discharge his burden as he did not specify facts to the District Court showing that there was a genuine issue for trial. Therefore, the District Court did not know he was relying on any specific evidence from Dr. Sevart. The court reporter's failure to file the deposition was immaterial. The Court of Appeals correctly ruled that the summary judgment was appropriate under these facts.

II. THERE IS NOT A CONFLICT IN THE CIRCUITS OVER WHETHER A COURT OF APPEALS HAS INHERENT POWER TO CONSIDER EVIDENCE NOT PRESENTED TO THE DISTRICT COURT.

In order to rectify his own error in failing to bring specific facts to the District Court's attention to show that there was a genuine issue for trial and therefore, summary judgment would not be appropriate, the petitioner argues that there is a conflict in the circuits over whether an appellate court has inherent power to consider evidence not presented to the district court. The petitioner argues that there is a conflict in the circuits between decisions of the Third, Fifth, Seventh and Tenth Circuits

and decisions of the District of Columbia, Second, Eighth and Eleventh Circuits. In essence, the petitioner has searched for cases from the D.C., Second, Eighth and Eleventh Circuits to support his alleged argument of a conflict in the circuits. In fact, there is no conflict in the circuits as there are cases from the District of Columbia, Second, Eighth and Eleventh Circuits which have ruled that the court of appeals does not have the power to consider evidence not presented to the district court. This alleged conflict in the circuits has been fabricated by the petitioner in order to tailor his petition to fit within the requirements of U.S. Supreme Court Rule 17.

Petitioner claims that the case of *Dickerson v. Alabama*, 667 F.2d 1364 (11th Cir. 1982), *cert. denied* 459 U.S. 878 (1982) establishes the Eleventh Circuit's position that evidence not submitted on the district court level is reviewable by a court of appeals. In *Dickerson*, the Court noted that there is authority to permit supplementation of the record but acknowledged that federal appellate courts do not often supplement the record on appeal with evidence not reviewed by the Court below. *Id.* at 1367. *Dickerson*, involved a pro se petition for a writ of habeas corpus filed by the petitioner in the Northern District of Alabama. The evidence which was omitted from the District Court was a trial transcript. The Court stated that whether an appellate record should be supplemented under the particular circumstances of a case is a matter left to the discretion of the federal courts of appeals and emphasized that in that case it was asked to review the District Court's review of the habeas corpus claim of a state prisoner. Clearly, the omission of a state trial transcript in reviewing a habeas corpus petition from a state

prisoner is quite different from the factual situation in this case and thus is not controlling authority.

The Eleventh Circuit has, in fact, ruled that evidence not considered at the district court level will not be reviewed by the appellate court. *In Re Inspection of Norfolk Dredging Company,* 783 F.2d 1526 (11th Cir. 1986) *cert. denied* 479 U.S. 883 (1986) involved a civil action in which one of the parties attached certain documents to his brief and the opposing party requested the Court to strike the attachments. The Court granted the motion to strike because the documents were not presented to the District Court. *Id.* at 1532, n. 7.

Ross is also an inapplicable basis on which to argue that the Eleventh Circuit permits supplementation of the record considered on appeal in all situations. The Eleventh Circuit in *Ross* permitted the supplementation with one deposition as the parties had relied on that deposition in pleadings before the District Court. *Ross v. Kemp,* 785 F.2d 1467, 1472 (11th Cir.). However, the Court ruled that the record would not be supplemented with another deposition which was not included in the District Court record and that affidavits may or may not be permitted in the record on appeal depending on whether the omission was a result of inexcusable neglect on the part of the attorney. *Id.* at 1472, 1476.

First Alabama Bank v. Parsons Steel, Inc., 825 F.2d 1475, 1487 (11th Cir. 1987) does not evidence a conflict in the circuits because in that case, the Court of Appeals did not permit supplementation of the record and stated that it felt no need to exercise its discretion in the case because the appellants could not specifically state whether the

District Court relied upon specific documents which the appellant sought to be included in the record on appeal. The Court in *United States v. Bosby*, 675 F.2d 1174, 1181 (11th Cir. 1982) recognized that generally an appellate court will not consider matters outside the record and held that affidavits which were submitted on appeal but were not submitted at the District Court level would not be considered because they were not properly before the Court.

The Eighth Circuit in *Turk v. United States*, 429 F.2d 1327 (8th Cir. 1970), far from articulating a general rule that the court of appeals should supplement the record on appeal in all situations, specifically tailored its ruling to permit the record enlarged for purposes of reviewing the issue of probable cause. In *Katsev v. Coleman*, 530 F.2d 176 (8th Cir. 1976), the Court had before it a case more similar to this case in that residents near a site of a proposed highway had filed suit to stop the construction and the District Court had granted summary judgment to the defendants. The Court affirmed, stating that the plaintiff's contention was not properly before the Court on appeal because the allegation was not considered by the District Court. *Id.* at 180. *See also Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 184 (8th Cir. 1973). ("While Maxey's contention has some logic to commend it, we are foreclosed from considering it because it was not raised below.")

Although the District of Columbia Circuit ruled in *Gatewood v. United States*, 209 F.2d 789 (D.C. Cir. 1953) that the record should be supplemented on appeal, the opinion provided authority for supplementation only when the evidence sought to be included in the appellate

record was in reality part of the record at the trial. That is not the situation in this case as the petitioner failed to make Dr. Sevart's testimony part of the record before the District Court when the motion for summary judgment was finally reviewed. Furthermore, in another opinion from the District of Columbia Circuit, *Hardy v. Northwestern Federal Savings & Loan Association*, 254 F.2d 70 (D.C. Cir. 1957), the Court reviewed an order granting summary judgment to the defendant when the appellant attempted to raise a point on appeal which was not raised at the District Court level. The Court ruled, "[W]e will not consider such a point raised for the first time on appeal." *Id.* at 71.

Petitioner also argues that the Second Circuit is in conflict with other circuits which prohibit an appellate court from considering issues not presented to the court below. In *United States v. Aulet*, 618 F.2d 182 (2nd Cir. 1980), *cert. denied*, 469 U.S. 933 (1984), the appellant claimed that he had ineffective assistance of counsel at a trial resulting in a conviction for knowing importation of cocaine; an argument which had not been addressed at the lower court level. Before ruling that under the facts of that case it would review the new argument, the Court recognized that generally, an appellate court will not consider an issue that has not been presented to the court below. *Id.* at 185. The Second Circuit has ruled in another case more factually akin to this case, *Dictograph Products Co. v. Sonotone Corp.*, 231 F.2d 867 (2nd Cir., 1956), *cert. dismissed* 352 U.S. 883 (1956) that an appellate court may not consider any depositions or other evidence that were not filed at the time the district court decided the motion. The Court stated, "this court has no jurisdiction save to

correct errors, and it cannot be an error to ignore evidence never presented to the court." *Id.* at 867.

This Court has previously decided the issue as to whether a court of appeals may decide an issue or review evidence which was not presented at the lower court level. In *Singleton v. Wolf*, 428 U.S. 106 (1976), this Court decided whether a court of appeals may proceed to determine a case on the merits when it was reviewing a denial of jurisdiction at the district court level based on a lack of standing. In an opinion delivered by Mr. Justice Blackman, the Court reiterated that it is the general rule that a federal appellate court does not consider an issue not passed upon below. *Id.* at 120. In *Braverman v. United States*, 317 U.S. 49, 55 (1942), this Court ruled that an appellate court will not review evidence which is not part of the record. Clearly, there is precedent in the United States Supreme Court that a court of appeals may not review issues or evidence which were not before the lower court. Because this Court has previously articulated a clear rule regarding the issue for which the petitioner requests additional review, the petition for writ of certiorari should be denied.

III. REVIEW BY THIS COURT IS NOT NECESSARY TO ENSURE UNIFORM PROCEDURES IN THE FEDERAL COURTS.

The petitioner argues that this Court should grant the writ to ensure uniform procedures in the handling of appeals throughout the federal judicial system. As previously stated, there is no conflict in the circuits regarding what issues and evidence an appellate court may review in an appeal. The United States Supreme Court has spoken on this issue and there is ample authority in all circuits for the established rule that issues and evidence not raised at the lower court are inappropriate matters for review on appeal.

The petitioner erred in not responding to the motion for summary judgment raised in the District Court. The court reporter's failure to file a copy of the omitted deposition with the District Court was a mistake which occurred after the Court had already ruled on the motion for summary judgment. The United States Court of Appeals for the Sixth Circuit was correct in ruling that it did not have the authority to consider evidence on appeal which was not considered at the District Court level. There is no authority which would support a contrary result.

CONCLUSION

For the foregoing reasons, this Court should deny the petitioner a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

WILLIAM J. GALLION
GALLION, BAKER & BRAY, P.S.C.
210 First National Building
Lexington, Kentucky 40507
Telephone (606) 255-6885

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON
NO. 83-329

EUGENE McDOWELL — PLAINTIFF

vs. *MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT*

DYNAMICS CORPORATION OF AMERICA — DEFENDANT

vs.

HAROLD JOHNSON and DANNY EUGENE TOWLES — THIRD-PARTY DEFENDANTS

** ** ** ** **

Comes the defendant, Dynamics Corporation of America, by counsel, and for its Memorandum of Law in Support of its Motion for Summary Judgment states the following:

On October 19, 1983, the plaintiff filed a Complaint against the defendant, Dynamics Corporation of America, seeking damages which allegedly resulted when he was injured when his trouser leg became entwined within the moving parts of a portable conveyor allegedly manufactured by the defendant, Dynamics Corporation of America. The products liability Complaint alleged the conveyor was defective, inherently dangerous, and unsafe because it was not designed to be as safe as reasonably possible under the present state of the art of the design of such portable conveyors at the time of its design and manufacture. Based on the pleadings, depositions in the record, and Affidavit of Robert Thayer filed

herein, the defendant, Dynamics Corporation of America, is entitled to summary judgment as a matter of law because the plaintiff was contributorily negligent in operating the conveyor and said negligence substantially contributed to the injury for which he is presently seeking damages and also because the plaintiff has failed to prove that the conveyor was used in its original, unaltered and unmodified condition. In fact, the evidence contained in the accompanying Affidavit from Robert Thayer, National Service Manager for the Portable Elevator Division of Dynamics Corporation of America, shows that the conveyor used by the plaintiff was heavily modified and altered and such alteration caused the plaintiff's injuries.

I. THE PLAINTIFF WAS CONTIBUTORILY NEGLIGENT AND SUCH NEGLIGENCE SUBSTANTIALLY CONTRIBUTED TO HIS INJURIES SUCH THAT HE IS BARRED FROM RECOVERY.

The plaintiff, Eugene McDowell, had worked in farming off and on all his life. (Eugene McDowell deposition number 2, hereinafter "McDowell #2", p. 4) He also worked for 25 years with Assex Corporation as a machine operator and a foreman. (*Id.*) Mr. McDowell owned his own farm since 1950. (*Id.*) He previously worked with grain elevators although he did not use one of his farm. (McDowell #2, p. 6) He has, however, owned equipment with a power takeoff device, i.e. a mowing machine bought in 1967. (*Id.*) The elevator which is the subject of this action was owned by Harold Johnson, who is the plaintiff's brother-in-law. (McDowell #2, p. 7) Mr. Dowell worked with Harold Johnson a lot and specifically

worked with him using the Little Giant elevator approximately three or four years before the date of his injury. (McDowell #2, p. 8) Mr. McDowell was familiar with how a power takeoff works once it is engaged and knows that it rotates. (Deposition of Eugene McDowell number 1, Appendix to deposition number 2, hereinafter "McDowell #1", p. 9.)

On the date plaintiff was allegedly injured, he hooked up the Little Giant elevator up to the tractor and also hooked the power takeoff to the tractor. (McDowell #2, p. 18.) Mr. McDowell noticed that there was no cover over the power takeoff. (McDowell #2, p. 21.) He also knew better than to put his clothing or body into the PTO shaft because he could get hurt. (McDowell #1, p. 10.)

Under KRS 411.320 Section 3, in any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective. This statute, as recently interpreted by the Kentucky Supreme Court in *Reda Pump Co. v. Finck,* Ky. 713 S.W.2d 818, 820 (1986), absolutely bars recovery in cases where contributory negligence of the plaintiff substantially contributes to cause an occurrence which injures the plaintiff. In this case, Mr. McDowell understood and perceived the risk of coming in close contact with the PTO shaft and his failure to take appropriate precautions in positioning himself far enough away from the rotating shaft to prevent his clothing from coming in contact with the shaft was a substantial contributing factor causing the accident which

resulted in his serious injuries. In determining whether a person is contributorily negligent, the surrounding circumstances must be considered, such as the exigency under which a person acted and his knowledge, whether actual or imputed, of the danger and the nature of the risk incurred. *Milby v. Mears*, Ky. App. 580 S.W.2d 724 (1979). There is no evidence that Mr. McDowell was working under exigent circumstances. He was familiar with the machinery and specifically with farm machinery since he was a farmer most of his life and worked as a machine operator for 25 years. Most importantly, he knew how the PTO shaft worked on the Little Giant conveyor because he had worked with the same machine for three to four years before his injury. He knew the nature of the risk involved in coming into contact with the rotating PTO shaft but he failed to protect himself. Under KRS 411.320 Section 3, Mr. McDowell's unfortunate negligence bars him from recovery against the defendant, Dynamics Corporation of America. The defendant, Dynamics Corporation of America, is entitled to a summary judgment as a matter of law.

II. THE LITTLE GIANT CONVEYOR AT ISSUE IN THIS CASE WAS NOT USED BY THE PLAINTIFF IN ITS ORIGINAL, UNALTERED AND UNMODIFIED CONDITION AND THEREFORE THE DEFENDANT IS NOT LIABLE FOR ANY INJURY RESULTING FROM ITS USE UNDER KRS 411.320 SECTION 1.

KRS 411.320 Section 1 provides: In any product liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would

have occurred if the product had been used in its original, unaltered and unmodified condition. For the purpose of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity, except those made in the accordance with specifications or instructions furnished by the manufacturer.

On July 6, 1983, Robert Thayer, who is the National Service Manager for the Portable Elevator Division of Dynamics Corporation of America, conducted an investigation of the portable elevator which allegedly caused the plaintiff's injuries. See accompanying Affidavit. According to Mr. Thayer, the Little Giant elevator was heavily modified and specifically, the power takeoff had been altered such that the back rod which was in place on the PTO was not the original rod manufactured by Dynamics Corporation of America. The "lemon-shaped implement end did not have the factory-equipped key and set screw" which existed on the original machine and in its place, someone had installed a bolt and nut which protruded about three quarters of an inch from the knuckle of the PTO on either side. Other modifications included removal of a shield covering the drive gear on the right side and the addition of a trailer hitch which raised the PTO five to six inches.

Because the elevator which Mr. McDowell used on the day of his injuries was substantially modified and altered and therefore was not used in its original condition, the plaintiff is not entitled to recover from the manufacturer, defendant Dynamics Corporation of America, under KRS 411.320 Section 1. The defendant,

Dynamics Corporation of America, is entitled to summary judgment as a matter of law.

CONCLUSION

For the reasons stated herein, the defendant, Dynamics Corporation of America, respectfully requests this court to enter summary judgment in its favor.

GALLION, EDELMAN, BAKER & BRAY

BY: /s/ William J. Gallion
WILLIAM J. GALLION
210 First National Bldg.
Lexington, KY 40507
(606) 255-6885

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Motion for Summary Judgment were served upon all parties herein by mailing same to the Hon. James J. Varellas, Suite 400, 134 North Limestone, Lexington, Kentucky 40507, the Hon. William R. Garmer, 300 West Short Street, Lexington, Kentucky 40507, Mr. Danny Eugene Towles, Route 3, Box 311, Stamping Ground, Kentucky 40324, and Mr. Harold Johnson, Route 3, Box 3316, Georgetown, Kentucky 40324 on this the 3rd day of December, 1986.

/s/ William J. Gallion
WILLIAM J. GALLION

AFFIDAVIT OF ROBERT THAYER

Comes the affiant, ROBERT THAYER, after being duly sworn, deposes and states as follows:

(1) That I am now, and at all times referred to herein the National Service Manager for the Portable Elevator Division of Dynamics Corporation of America.

(2) That on July 6, 1983 I conducted an investigation of the portable elevator owned by Mr. Harold Johnson and the part of the same elevator which allegedly caused the injury to Mr. Eugene McDowell on October 22, 1982.

(3) That the investigation determined the elevator was a "Little Giant" portable elevator which was manufactured by Dynamics Corporation, and probably distributed by Brinly-Hardy of Louisville. The elevator was model 21. The machine's design and decals on the elevator indicate it was manufactured and sold sometime between August, 1967 and May, 1968.

(4) At the time of the manufacturing of this equipment there were no federal, state or local codes which specifically applied to agricultural products' standards. The defendant's product was in par with competitors and met the standards proscribed by the American Society of Agricultural Engineering (ASAE).

(5) The product had been heavily modified, in particular the power takeoff (PTO). The PTO was not the original equipment. The PTO is made up of two (2) rods. The back rod was not the original rod manufactured by Dynamics. The lemon shaped implement end did not have the factory equipped key and set screw as the original. Instead someone had drilled out the hole on the

knuckle (PTO) and installed a very dangerous bolt and nut which protruded about 3/4 of an inch from the knuckle on one side and about the same on the opposite side. The factor equipped setscrew would not have protruded. The altered setscrew undoubtedly caught injured's clothing.

(6) Other modifications included the removal of a shield covering the drive gear on the right side, and the addition of a trailer hitch which raised PTO five to six inches.

(7) From the facts of the accident, and my examination of the equipment, the nut and bolt alteration to the original equipment, as described in paragraph 5, caused the injury.

Further affiant saith not.

/s/ Robert Thayer
ROBERT THAYER
Dynamics Corporation of America
Portable Elevator Division
P.O. Box 2947
Bloomington, IL 61701

STATE OF KENTUCKY)
) SCT.
COUNTY OF FAYETTE)

Subscribed and sworn to before me by Robert Thayer on this the ___ day of September, 1985.

My commission expires: _____.

_____
NOTARY PUBLIC, STATE AT LARGE, IL

STATE OF ILLINOIS

COUNTY OF McLEAN

Subscribed and sworn to before me by Robert Thayer on this the 7 day of October, 1985.

My Commission expires: March 2, 1986.

/s/ Larry W. Hankins
NOTARY PUBLIC, STATE AT LARGE, IL

APPENDIX B

DON K. SMITH & ASSOCIATES
Certified Shorthand Reporters
P.O. Box 47566
Wichita, KS 67201

316-262-7285
710 W. Douglas 1-800-346-3025
Wichita, KS 67203 July 6, 1987 Ext. 487

Mr. William J. Gallion
Attorney at Law
First National Bank Bldg, Suite 210
Lexington, KY 40507

RE: McDOWELL vs. DYNAMICS CORP.
Case No. 83-329

Dear Mr. Gallion:

This is to advise you that the original transcript of the deposition of JOHN B. SEVART, P.E., taken on behalf of the defendants on the 15th day of May, 1987, in the above-entitled case has been returned to this office with the enclosed correction sheet.

The deposition will now be placed in a court envelope and forwarded to you for safekeeping until the time of trial.

Very truly yours,

/s/ Don K. Smith, C.S.R.
DON K. SMITH & ASSOCIATES

cc: Mr. William R. Garner

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 87-5794

EUGENE McDOWELL PLAINTIFF

V. *AFFIDAVIT*

DYNAMICS CORPORATION OF AMERICA
DEFENDANT

** ** **

I, William J. Gallion, being first duly sworn, depose and state as follows:

1. That this Affidavit is made on personal knowledge after a review of the pertinent records in this matter and is submitted in response to an appeal by the plaintiff of the district court's order granting summary judgment to the defendant, Dynamics Corporation of America.

2. That I am and at all times pertinent hereto have been counsel for the defendant, Dynamics Corporation of America and was the attorney who obtained the deposition of John B. Sevart, P.E. taken on May 15, 1987 in Wichita, Kansas.

3. As counsel for defendant, I requested that the court reporter provided me a copy of the transcribed deposition of John B. Sevart, P.E. and that this transcribed deposition was sent to me postmarked July 6, 1987.

Further Affiant sayeth naught.

/s/ William J. Gallion
WILLIAM J. GALLION

STATE OF KENTUCKY)
)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by William J. Gallion on this the 24th day of November, 1987.

/s/ Elizabeth R. Hood
NOTARY PUBLIC, STATE AT LARGE

My Commission Expires:
10-9-89

CERTIFICATION

I hereby certify that the foregoing Affidavit has been served upon the parties by mailing a copy of same to Hon. James E. Thompson, BURNAM & THOMPSON, P.S.C., P.O. Box 726, Richmond, Kentucky 40475; Hon. William R. Garmer, SAVAGE, GARMER & ELLIOTT, P.S.C., 300 West Short Street, Lexington, Kentucky 40507; and Hon. James J. Varellas, VARELLAS, PRATT & COOLEY, Suite 400, 134 N. Limestone Street, Lexington, Kentucky 40507, on this the 24th day of November, 1987.

/s/ William J. Gallion
WILLIAM J. GALLION